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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35776

UNION PACIFIC RAILROAD COMPANY—OPERATION EXEMPTION—IN BEXAR AND WILSON COUNTIES, TEX.

Digest:[1] Previously, the Board granted Union Pacific Railroad Company (UP) authority to operate a railroad line in Bexar and Wilson Counties, Tex., but indicated that facts asserted by UP and Frac Resources LP had raised questions regarding the circumstances under which the line was built. The Board kept the docket open to investigate such circumstances. The Board is unable to reach a majority decision on whether remedial action is appropriate. Accordingly, the Board will take no further action in this matter.

Decided: February 27, 2015

On October 21, 2013, Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a rail common carrier over approximately 7,391 feet of track between milepost 16.1 and milepost 17.5 in Bexar and Wilson Counties, Tex. (the Line). According to the notice, on October 17, 2013, UP purchased the Line from Frac Resources LP (Frac Resources), which had constructed the Line on a UP-owned right-of-way to facilitate rail service to the Frac Resources facility. Notice of the exemption was served and published in the Federal Register on November 6, 2013 (78 Fed. Reg. 66,802). The exemption was scheduled to become effective on November 20, 2013.

On November 13, 2013, BNSF Railway Company (BNSF) filed a petition to reject the notice of exemption and to stay the effectiveness of the exemption, if needed, to afford the Board sufficient time to act on BNSF's petition to reject. BNSF argued that the streamlined exemption procedures of § 1150.31 were not appropriate because the proposed transaction presents non-routine and potentially controversial issues related to BNSF's right to provide competitive service to shippers on the Line pursuant to conditions imposed in the UP/Southern Pacific merger proceeding. By decision served on November 15, 2013, the Chairman issued a housekeeping stay postponing the effective date of the exemption until further order of the Board to allow time for parties to reply to BNSF's petition and for the

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Board to fully consider the arguments presented.[2] UP filed a reply on November 18, 2013. Frac Resources and Mission Rail Industrial Park LLC (collectively, FRAC) together filed a reply on December 11, 2013.[3] FRAC requested that the Board allow the exemption to become effective so that service to Frac Resources and Mission Rail Park could begin. FRAC stated that any further delay in providing service would have severe adverse consequences for both Frac Resources and Mission Rail Park, given that approximately 200 rail cars were en route and were badly needed by Frac Resources to service its customers.[4]

By decision served on December 24, 2013, the Board lifted the housekeeping stay and denied BNSF's petition to reject the notice. However, the Board noted that UP's and FRAC's descriptions of the circumstances leading to UP's request for operating authority raised questions as to whether Board authority to construct the Line under § 10901 was required and whether the transaction between UP and Frac Resources was structured purposefully to avoid seeking such authority.[5] While lifting the stay to permit needed service to Frac Resources to begin, the Board stated that it would keep this docket open to investigate the circumstances under which the Line was built so that it could determine whether remedial action was appropriate. The Board also directed UP to file a copy of the executed Industry Track Agreement (ITA) between UP and Frac Resources. On January 6, 2014, UP submitted under seal the ITA, dated May 21, 2013, as well as Supplemental Agreement No. 1, dated October 17, 2013.

We have considered the record before us but are unable to reach a majority decision on whether remedial action is appropriate. Accordingly, the Board will take no further action in this matter.

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[2] Union Pac. R.R. Co.—Operation Exemption—in Bexar & Wilson Cntys., Tex., FD 35776, slip op. at 1 (STB served Nov. 15, 2013).

[3] According to FRAC, Mission Rail Park is a new industrial complex just south of San Antonio, which the track at issue here is intended to serve, and Frac Resources is "one of the first tenants" of Mission Rail Park. FRAC Reply 1-2 (filed Dec. 11, 2013). FRAC stated that, after it approached UP in 2012 for the purpose of obtaining rail service, UP and FRAC entered into an Industry Track Agreement that required FRAC to construct the Line on a right-of-way owned by UP. FRAC stated that after the Line was constructed, UP purchased the track over which UP would provide rail services to Frac Resources and Mission Rail Park. Id. at 2. FRAC added that, in entering into the agreement, it anticipated that other railroads (specifically BNSF) also would be able to serve Mission Rail Park. Id. at 2-3.

[4] Id. at 3-4.

[5] Union Pac. R.R. Co.—Operation Exemption—in Bexar & Wilson Cntys., Tex., FD 35776, slip op. at 3 (STB served Dec. 24, 2013). A rail carrier must seek prior approval from the Board under 49 U.S.C. § 10901 to construct a new rail line or to extend an existing rail line into a new market. Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4 (STB served Feb. 19, 2014), citing Tex. & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266, 278 (1926).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman. Acting Chairman Miller and Vice Chairman Begeman commented with separate expressions.

ACTING CHAIRMAN MILLER, commenting:

The record developed before the Board indicates to me that UP's verified notice contained false and misleading information regarding the circumstances under which the Line was built. UP indicated in its notice that Frac Resources approached it in 2012 about "reinstating service" on the Line, which, the notice states, Frac Resources constructed to facilitate service to its facility.[1] UP asserted in the notice that no authority was needed to construct the Line because "Frac Resources is not a rail common carrier and did not intend to operate the track as a rail common carrier."[2] Then, according to UP, "[a]s plans for rail service developed, the parties determined that the best course of action was for UP to operate the Line as a rail common carrier," and "[t]o this end, UP purchased the track from Frac Resources"[3] on October 17, 2013. UP claimed that, at the time it purchased the Line, the track was properly classified either as ancillary track excepted from Board licensing pursuant to 49 U.S.C. § 10906[4] or private track outside the Board's jurisdiction. UP stated Board authority was therefore not required for UP to purchase the track.[5]

However, it appears from the Industry Track Agreement (ITA) and the information provided by FRAC Resources that from the very beginning, even before the Line was built, the parties understood and intended that it would be a common carrier line to be operated by UP. The record indicates that Frac Resources and UP entered into the ITA *before* the Line was constructed: the ITA provides, for example, that "Industry [Frac Resources], at its expense,

[1] UP Notice of Exemption 3 (filed Oct. 21, 2013).

[2] Id. at 3 n.3.

[3] Id. at 3.

[4] Ancillary track is typically used for loading, unloading, switching, or other purposes that are incidental to main line operations. Ancillary track is excepted from the Board's approval requirements because it does not penetrate or invade a new market but simply augments the capacity of existing main-line operations that are already authorized. Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4-5 (STB served Feb. 19, 2014).

[5] UP Notice of Exemption 3 n.4.

will . . . install the Track 793 Extension [the Line]"[6] (which was built on a right-of-way that previously was abandoned by a UP predecessor) and that its contractor would be required to execute UP's Right of Entry Agreement "prior to start of work" on UP's property.[7] The ITA further provides that Frac Resources "shall convey" the Line to UP within 30 days after completion.[8] Moreover, the ITA specifically states that "[u]pon completion of the Track 793 Extension [the Line] and conveyance of satisfactory title thereto, *[UP] shall operate the Track 793 Extension as a common carrier track*."[9] Nothing in the ITA suggests that the parties ever considered the Line to be, or intended it to be operated as, anything other than a common carrier line.

Based upon that evidence, I conclude that the Line likely was never conceived to be built or operated as ancillary track within the meaning of § 10906 or private track. As a result, the statements to the contrary in UP's verified notice of exemption appear to be false and misleading.

In its unanimous decision allowing the exemption to go into effect,[10] the Board made clear that doing so did not mean that it condoned UP's actions. Though I was not yet a member of the Board when that decision was issued, I understand that the Board permitted the authority to become effective—despite reservations over UP's actions—because denial of the exemption would have harmed Frac Resource's immediate interests. However, the Board also explicitly and intentionally left the docket open so that it could further consider the appropriateness of UP's actions and whether there should be consequences. To that end, in the December 2013 Decision, slip op. at 3, the Board directed UP to produce the ITA, which was not in the record. I agree with the Board's reasoning in that decision that the harm done to the shipper by denying the exemption outweighed the harm to our processes by granting it, but I also believe that the Board prudently kept the docket open to investigate the circumstances under which the Line was built so that we could determine whether remedial action is appropriate. I am disappointed that the Board is not now able to follow through with its stated course of action from the December 2013 Decision and explore appropriate, remedial action.

In light of the facts in this proceeding, I would have directed UP to show cause why prior Board approval to construct the Line under § 10901 was not required and why UP's

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[6] ITA § 2.2 (emphasis added). UP designated Sections 2 and 4 of the ITA (among others) as "highly confidential." Although the Board attempts to avoid references to confidential or highly confidential information in its decisions, it reserves the right to rely on and disclose such information when necessary. Here, I conclude that this limited disclosure of information in the ITA is necessary to adequately explain my reasoning here.

[7] Id. § 3.

[8] Id. § 4.1.

[9] Id. § 4.2 (emphasis added).

[10] Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Cntys., Tex. (December 2013 Decision), FD 35776, slip op. at 3 (STB served Dec. 24, 2013).

statements in its verified notice of exemption seeking operating authority under 49 C.F.R. § 1150.31 were not false and misleading. Had the Board then determined that UP had violated the statute or the Board's regulations, it could have imposed remedies to address UP's actions, including: environmental remediation (such as preparation of a focused environmental mitigation study to examine the impact of current and projected rail traffic at Mission Park); additional scrutiny of UP's filings at the Board;[11] and/or fines.[12] Unfortunately, a majority of the Board is now unwilling to pursue these actions. Nonetheless, I believe this matter has sat at the Board for far too long to further wait to see if a majority consensus could be reached.

While I am unable on my own to order remedial action, I am able to express my disappointment with the actions that UP chose to take in this instance. In my experience, UP has been a fair and above-board participant in matters before the Board—but not so here. I believe it is the Board's duty to hold accountable those that knowingly and willingly avoid our oversight for their own convenience and gain. Rest assured that in the future I will be vigilant to detect and address actions that do not align with the statute and the relevant Board regulations.

VICE CHAIRMAN BEGEMAN, commenting:

I concur in this result. As the only member who was serving when the Board issued the unanimous December 2013 decision, I cannot support a show cause order (the decision I was originally presented for voting) based on what I see as the same information the Board unanimously determined was insufficient for such purposes 14 months ago.[1]

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[11] See James Riffin—Acquis. & Operation Exemption—in Rio Grande & Mineral Cntys., Colo., FD 35705, slip op. at 3-4 & n.7 (STB served Jan. 11, 2013), pet. for review denied, sub nom. Strohmeyer v. STB, No. 13-1064 (D.C. Cir. Dec. 30, 2013).

[12] 49 U.S.C. § 11901. See also, e.g., Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 21, 2010).

[1] See December 2013 Decision, slip op. at 3.